

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS  
DIVISION OF ST. THOMAS AND ST. JOHN

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) **D.C. Crim. App. No. 2002-0170**  
) Re: Terr. Ct. Crim. No. 167-2002  
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MEMORANDUM OPINION

**I. SUMMARY**

Appellant Wagenbach argues that the Appellate Panel should vacate the trial court's order of judgment and commitment because the trial court abused its discretion in failing to dismiss the case. Because the trial judge did not abuse her discretion in denying appellant's motion to dismiss, this Court will uphold the decision below.

**II. STATEMENT OF THE CASE**

On May 6, 2002, appellant Kelly Wagenbach was arrested for stealing three bottles of cognac and a deck of playing card from K-Mart on St. Thomas. She was charged with petit larceny in violation of 14 V.I.C. § 1081 and § 1084.

On August 12, 2002, the matter came on for trial. The prosecutor, newly assigned to handle the matter on behalf of the government of the Virgin Islands, realized that the government had tendered no pre-trial discovery to the appellant. The appellant made a motion to dismiss. The prosecutor stated that he had no objection to the motion. The Territorial Court then inquired as to the time frame for appellant's counsel to prepare. He answered, "next week." The trial court found that postponement of the trial would cause no prejudice to the appellant, who was not in pre-trial custody.

The prosecutor then informed the trial judge that the appellant might be better served by a long continuance date, entering a substance abuse program, and eventual dismissal of the case. The Court asked whether this was a policy of the Department of Justice, and the prosecutor replied in the negative. The prosecutor then withdrew his request to join in the appellant's motion to dismiss, and represented that the government wished to prosecute the appellant.

The appellant then argued that the court was interfering with prosecutorial discretion. The government did not join in these arguments. The court then denied the defendant's motion to dismiss and trial was scheduled.

On September 9, 2002, appellant filed a motion to reconsider denial of the government's notice of *nolle prosequi* with a supporting memorandum of law, stating that the judge refused to grant the prosecution's *nolle prosequi* request. On September 11, 2002, the trial judge denied the appellant's motion and stated that "[t]he characterization that the government filed a notice of *nolle prosequi* is a serious misrepresentation of fact."

On September 18, 2002, the appellant was convicted of petit larceny in violation of 14 V.I.C. § 1081 and § 1084. On October 21, 2002, appellant was sentenced. She now timely appeals.

### III. JURISDICTION AND STANDARD OF REVIEW

This Court has jurisdiction to consider the judgments and orders of the Territorial Court in criminal cases. 4 V.I.C. § 33; Section 23A of the Revised Organic Act of 1954.<sup>1</sup>

In this case, the appellant argues that the trial court interfered with prosecutorial discretion, but she has no standing to litigate an alleged infraction of the government's right to prosecute. Accordingly, this Court lacks subject matter jurisdiction to address this aspect of the appeal.

This Court exercises plenary review over questions of statutory construction of the Federal Rules of Criminal Procedure. We review of a trial judge's judgment in denying the defendant's motion to dismiss for abuse of discretion.

### IV. DISCUSSION

While a criminal defendant does not have standing to assert the government's right to dismiss a criminal prosecution or enter a *nolle prosequi*, we need not even reach this issue. In this case, the government made no motion to dismiss nor did it move for a *nolle prosequi*. It was the appellant who moved to dismiss

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<sup>1</sup> See Revised Organic Act of 1954 § 23A, 48 U.S.C. § 1613a. The complete Revised Organic Act of 1954 is found at 48 U.S.C. §§ 1541-1645 (1995 & Supp. 2001), reprinted in V.I. CODE ANN. 73-177, Historical Documents, Organic Acts, and U.S. Constitution (1995 & Supp. 2001) (preceding V.I. CODE ANN. tit. 1).

the case. While the government initially indicated that it no objection to the motion, it reversed this position before the trial court ruled on the appellant's motion.

The trial court's inquiry into the policies of the government regarding dismissal of certain cases was not an impermissible encroachment on the executive's power to prosecute. Even when it is the prosecutor who moves to dismiss a case under Federal Rule of Criminal Procedure 48(a), "the Territorial Court's mere effort to obtain information surrounding the prosecution's attempted dismissal of [defendant's] information does not suffice to work a substantive change in the prosecution's power of *nolle prosequi*." *In re Richards*, 213 F.3d 773, 788 (3d Cir. 2000). The trial judge acted within the scope of her authority when she inquired whether there was an official policy to dismiss criminal prosecutions in certain circumstances.

## V. CONCLUSION

The appellant does not have standing to litigate the right to prosecute of the Attorney General. Furthermore, the trial judge's decision to deny the defendant's motion to dismiss was appropriate and will not be disturbed by this Court.

**DATED this 26th day of March, 2004.**

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**ATTEST:**

WILFREDO F. MORALES  
Clerk of the Court

By: \_\_\_\_\_  
Deputy Clerk

NOT FOR PUBLICATION

**IN THE DISTRICT COURT OF THE VIRGIN ISLANDS  
DIVISION OF ST. THOMAS AND ST. JOHN**

**KELLY WAGENBACH,**

Appellant,

v.

**GOVERNMENT OF THE VIRGIN ISLANDS,**

Appellee.

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) **D.C. Crim. App. No. 2002-0170**

) Re: Terr. Ct. Crim. No. 167-2002

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On Appeal from the Territorial Court of the Virgin Islands

**Considered: February 27, 2004**

**Filed: March 26, 2004**

**BEFORE:**     **RAYMOND L. FINCH**, Chief Judge, District Court of the Virgin Islands; **THOMAS K. MOORE**, Judge of the District Court of the Virgin Islands; and **PATRICIA D. STEELE**, Judge of the Territorial Court, Sitting by Designation

**ATTORNEYS:**

**Debra S. Watlington, Esq.**

Assistant Territorial Public Defender  
St. Thomas, U.S.V.I.

*Attorney for Appellant,*

**Matthew C. Phelan, Esq.**

Assistant Attorney General  
St. Thomas, U.S.V.I.

*Attorney for Appellee.*

**ORDER**

**Per curiam.**

**AND NOW,** this 26th day of March, 2004, having considered the parties' submissions and arguments, and for the reasons set forth in the Court's accompanying Memorandum Opinion of even date, it is hereby

**ORDERED** that the decision of the Territorial Court is **AFFIRMED.**

**ATTEST:**  
WILFREDO MORALES  
Clerk of the Court

By: \_\_\_\_\_  
Deputy Clerk

**Copies to:**  
Judges of the Appellate Panel  
Honorable Geoffrey W. Barnard  
Honorable Jeffrey L. Resnick  
Judges of the Territorial  
Court  
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St. Thomas, U.S.V.I.  
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